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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 398

HORSMAN DOLLS, INC.,

Appellant,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey;
JOSEPH A. MURPHY,
Assistant Deputy Attorney General of New Jersey;
HERMAN D. RINGLE,
Attorney and Counsel for Appellee;
CHARLES A. MALLOY,
Chief Counsel for Appellee, Counsel for Appellee.

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STATUTES CITED

Unemployment Compensation Law, adopted in 1936, (N.J.R.S., 43:21 (3a), (6), (6a), (6b), (6c), (7a), (7b), (7c) 2, 8
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No. 398

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STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee asserts that the statutory provision, Title 28, U. S. Code, Section 1257(2), relied on by the appellant does not sustain the jurisdiction of the Court; the unsubstantial character of the grounds stated by the appellant and the lack of substance in the questions raised by this appeal are so apparent on the face of the record as to warrant the Court to summarily dispose of the appeal at this time.

Nature of the Case

The Unemployment Compensation Law, adopted in 1936, imposed a tax upon all subject employers, which was

uniform in rate until 1942 (N.J.R.S. 43:21-7(a) and (b)), and directed the payment of benefits during and after 1939 (N.J.R.S. 43:21-3(a)).

In the year 1942 and thereafter, an employer under subsections 7(c)(3) and (4) (Appendix herein), after three years of coverage retained his basic rate of 2.7 per cent or was assigned a merit rate of 1.8 per cent or 0.9 per cent, or assigned a penalty rate of 3.6 per cent, depending on his past employment experience.

The contribution rate assigned to the appellant, Horsman Dolls, Inc., for the year 1942 was 3.6 per cent. The appellant protested this rate before the Commission, contending that all charges made to its account during 1939 to 1941, inclusive, should be removed and that its contribution rate for 1942 should then be redetermined.

The Commission scheduled a hearing to determine the nature and the merits of the appellant's complaint. It was not until the hearing was considerably in progress that it was revealed that the appellant wished all charges made to its account during the years 1939 to 1941, inclusive, erased without challenging the propriety of any benefits paid in the tribunals constituted to hear and decide disputed claims for benefits under section 6 of the statute (Appendix herein), because it had not received notices of the decisions made by the deputy under subsection 6(b) (R163a-37-40; R232a-5-15; R233a-14-20). Hearings before the Commission on the appellant's protest were concluded on November 1, 1943.

After protracted litigation on another phase of this case, the Commission made its decision which held, in substance, that the Commission did not have the power or right under the statute and under the facts of this case to erase the benefit charges made to the account of appellant, Horsman Dolls, Inc., that the appellant had to exhaust its administra-

tive remedies before the appellate tribunals constituted under N.J.R.S. 43:21-6, and that the contribution rate assigned to it for 1942 of 3.6 per cent was properly cast.

The opinion of the Supreme Court of New Jersey (officially reported in 7 N. J. adv. 541), which affirmed the decision of the Commission, has been brought before this Court for review on appeal.

Facts

When an employee of the appellant was detached from his employment, during 1939 to 1941, inclusive, he reported to the local office of the Employment Service and filed an initial claim for benefits (R73a-30-38; Ex. P-2, R261a). The initial claim for benefits was transmitted to the central office of the Commission in Trenton where the claim was carefully checked against all reports and other information in the possession of the Commission (R74a-30-40; R75a-4-18). Then a "Notice to Employer of Claim for Benefits" (B-11) (Ex. P-9, R272a; Ex. P-14, R281a) was prepared in each instance when the claim was a valid one (claimant had earned $150 or more in his base year) and mailed to the appellant when it was the last employer (R57a-5-13; R210a-11-38; R216a-29-40; R218a-24-31; R220a-4-22).

The appellant did not send separation notices (B-6) to the Commission, required under the latter's regulations (Ex. P-16, R284a; R135a-12-22; Ex. C-1) although the appellant had possession of the regulations (R221a-4-7, 15-18).

Besides the appellant's failure to send separation notices, it never responded to any "Notice to Employer of Claim for Benefits" (B-11) which was mailed to it by the deputy with respect to each benefit claim (R238a-12-23). The appellant received the aforementioned Notices (B-11's) but paid no attention to them (R126a-24-33). The only witness,

Robert I. Garnier, produced in behalf of the appellant specifically testified as follows (Hearing of May 17, 1943):

> "Q. Mr. Garnier, are you qualified to testify in behalf of the company with respect to all matters that pertain to the employment experience or to its employment experience, and particularly in so far as it may affect any charges that were made to the employer's account in the Unemployment Compensation Commission during the years 1939 to 1941 inclusive? A. Yes.
>
> "Q. At the last hearing you testified that all communications and notices, particularly from the taxing agencies of the State, are directed to your attention? A. Yes, sir.
>
> "Q. And you also testified that by reason of the practice followed with your company that you received the regulations of the Commission? A. Yes." (R220a-29-40, R221a-5-8).

and the witness had previously testified as follows:

> "Q. Who took charge of them? A. Of the B-11's?
> "Q. Yes. A. Why I will answer this this way: In 1938, 1939 and 1940 I really paid no attention to them." (R132a-5-8).

and the witness further testified:

> "Q. Have you got all the B-11's that you received from the Commission after 1939, 1940 and 1941? A. No, I have not.
>
> "Q. What did you do with them? A. Why, sometimes when we cleaned up our files, I probably threw a lot of them out, I didn't keep them." (R136a-12-17).

This witness, Robert I. Garnier, further testified that the appellant never responded to the B-11's or otherwise notified the deputy or the Commission, because the appellant's business was seasonal in nature and was shut down at certain periods of the year; and testified that the appel-

lant had no objection to the payment of benefits because there was no employment. The witness's testimony in this regard, after directing attention to the fact that the appellant paid no attention to the B-11's, was as follows (Hearing of May 17, 1943):

> "Q. Previous to that you testified you paid no attention to them? A. Right.
>
> "Q. Why not? A. Because our business is a seasonable business and we were shut down January, February and March, and sometimes April. In the last two years we have worked right through.
>
> "Q. During those years when your business was being carried on, you received some of these notices, didn't you? A. Yes.
>
> "Q. You didn't answer them? A. No, because we had no employment. There was no objection I could make." (R141a-40; R142a-5-14).

The appellant's witness (Mr. Garnier) testified that he, as the representative of the appellant, would have known during the years 1939 to 1941, inclusive, whether any of the appellant's detached employees were not entitled to benefits (R. 224a-24-32). He also testified that he knew that some of its detached employees were receiving benefits; e.g.,

> "Q. I am allowing you to speak your mind. You may continue. Do you mean to say, Mr. Garnier, that being in the employ of your—A company whose business was highly seasonal during the years 1939 to 1941 inclusive, having knowledge that there was an Unemployment Compensation Law, being familiar with our law and with our regulations, knowing that these unemployed individuals, such as your employees, would go to a local office for benefits, do you say that you believe that no one of your employees were receiving benefits during those years? A. I wouldn't say that. Just repeat that?
>
> "Q. Do you have any reason to say that you believe that none of the disemployed employees of the company

during the years 1939 to 1941 were not receiving benefits? A. I know some were receiving benefits.

"Q. Had you any reason to believe that all of them were not receiving benefits when they were laid off? A. That I couldn't tell you. I couldn't swear to that. The only way I could answer that question is that I knew certain individuals were receiving compensation because they told me. I had my own son was receiving compensation in those years, so that I know definitely that he was paid. That is the only way I can answer that question." (R. 236a-13-40).

When an employer (this did not apply to appellant in the instant case because it paid no attention to the B-11's) responded to the B-11 or transmitted a separation notice (B-6), a notice of the disposition of the case by the deputy was always mailed by him to the employer (R. 100a-25-32; R. 112a-38-41; R. 113a-5-28; R. 147a-22-40; R. 148a-4-14; Ex. P-13, R. 279a-280a).

The deputy testified that whenever any employer responded to a B-11, the claimant did not receive any checks before the employer was notified of the deputy's action or decision favorable to the claimant and of the employer's right of appeal (R. 84a-8-21).

In June, 1942, appellant received a notice of its experience rate for that year which showed thereon the reasons for the change of its contribution rate (Ex. P-1, R. 9a; R. 149a-25-27). This shows that from 1936 to 1941, inclusive, it had paid contributions to the Commission in the sum of $48,929.26 and that benefits paid to its detached employees and charged to its account were in the sum of $98,203.34.

At the time of the hearing of September 28, 1943, it was shown that of the aforementioned benefits charged to the appellant's account, only $3,112.61 was paid to claimants when appellant was not the last or most recent employer,

and that the sum of $1,750.76 could not be allocated; however, if the appellant's account was disburdened of the total ($4,863.37), its contribution rate of 3.6 per cent for 1942 would not be changed or altered (R. 179a-10-40; R. 180a-4-10). Later adjustments of the unallocated sum did not affect the result (R. 244a-4-27).

Shortly after the transmission of the Notice of Employer Contribution Rate for the year 1942 (Ex. P-1, R. 9a) to appellant and its request for a hearing thereon, the appellant received a separate breakdown of the benefit charges, etc., for the years 1939 to 1942, inclusive, on a separate form (B-110) (Ex. P-15, R. 283a, R. 143a-37) for each one of its employees who had received benefits during those years.

On November 1, 1943, the appellant through its attorney received a separate statement with respect to each benefit claim filed by its detached employees during 1939 to 1941, inclusive, which contained all the factors or elements of an "initial determination" and the benefits paid on each claim during those years. (Ex. P-19, R. 281a; R. 246a-30-40; R. 247a-4-24; R. 249a-4-11). From the date of the receipt of the B-110's and the receipt of the detailed statements in 1943, no proof was submitted by the appellant to show that any detached employee, except a few isolated duplications corrected by the Commission itself, was not entitled to receive his benefits.

On January 13, 1943, appellant through its attorney, wrote to the Commission, advising that it had received the Commission's amended Form AC-174, showing the computation of its contribution rate for 1942 (R. 9a) and requested a hearing on the ground that it disagreed with the contribution rate shown on such form. In answer to this communication, the Commission mailed to the attorney for appellant, a form of Petition for Hearing which was executed by it on March 9, 1943, and returned to the Commission (R. 10a-11a).

Appellant set out the following reasons for its request for a hearing:

> "Petitioner contends that improper charges have been made against his account adversely affecting his rate."

The Commission, after years of litigation on another phase of this case, made its decision on April 1, 1948 (R. 19a-22a). It decided that it was without legal authority to grant a continuation rate for the year 1947 for the appellant other than 3½ per cent, and that it was without legal authority to relieve the account of the appellant of the charges for benefits paid unless and until their improperity was determined in the proper tribunals established by law.

I. Reasons and Grounds Relied Upon for Jurisdiction

The principal ground relied upon to sustain the jurisdiction of this Court is the appellant's failure to challenge the constitutionality of the statute before the Supreme Court of New Jersey. The record shows that the validity of the statute (N. J. Revised Statutes 43:21-7(d)). Appellant herein was not drawn in question as repugnant to the United States Constitution; and for this reason alone the appeal must be dismissed.

Powell v. Supervisors of Monmouth County, 150 U. S. 481;

Jett Brothers Distilling Co. v. Carmichael, 292 U. S. 1;

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

In fact, the appellant itself directed attention to the constitutionality of the statute in its argument to the Court below. In the last brief filed by the appellant with the Supreme Court of New Jersey, entitled "Supplemental Brief for Plaintiff-Respondent on Reargument" (certified

copy of which has been filed herein), the appellant said (pp. 6, 7):

> "*In this case, however, Mercurio Dolfi does not complain about the Unemployment Compensation statute.* The procedure which the legislature established, if it be read and interpreted as the Board of Review construed it (See Br. [illegible] main brief), is valid and constitutional. By that interpretation the deputy is required to give the notice which satisfied due process. In that event the plaintiff does not challenge the constitutionality of the statute. *What is against due process in this case is the deputy's violation of the statute;* * * *" (Italics ours.)

and the appellant further directing attention to the constitutionality of the statute said (p. 8):

> "*In the face of a statute which specifically provided for a constitutional method of giving to the employer the requisite notice,* the deputy was not justified in substituting something less than the full notice to which the employer was entitled.
>
> "The fact that the plaintiff received a 'notice that a claim was filed' does not bar him by estoppel from maintaining or demand that he be afforded the particular notice which the legislature directed he receive." (Italics ours.)

and again the appellant stated its position (p. [illegible]):

> "The deputy was required to adhere to the specific standards which the legislature imposed upon him and a lesser notice which the Commission invented was no substitute for the legislative mandate."

Furthermore, the Supreme Court of New Jersey, in both the majority and dissenting opinions, gave the statute a construction which conformed to the one urged by the appellant. The appellant had argued that it was entitled under the statute to notice of the date of the deputy and

withstanding the fact that it had not responded to the "notices of claims for benefits" received by it from the deputy and had not urged any objections to the payment of benefits. The Court, in construing the statute, decided, "we shall resolve the doubt in favor of notice" (Opinion, p. 5; 7 N. J. 541, 547). The Court held that the appellant could not complain, because it could show no harm or injury and further, that laches and the principle of estoppel in *pais* served to bar the relief sought. The opinion was based on these facts: that no objections were made by the appellant to the payment of benefits, during 1939 to 1941, inclusive, because it knew of no objections and had no knowledge of any disqualifying factors; that from the time it received notice of its contribution rate in 1942 including summary statement of benefits paid or from the time it received detailed statements in 1943 with respect to each benefit claim and the action taken thereon, it did not initiate any administrative appeals to review the benefit allowances and did not attempt to challenge the validity of the charges to its account in any administrative tribunal (See subsections 6(c), (d) and (e) of the New Jersey statute, Appendix herein).

The findings of the State court upon matters of fact are conclusive.

Noble v. *Mitchell,* 164 U. S. 367;
Chrisman v. *Miller,* 197 U. S. 313;
Waters-Pierce Oil Co. v. *Texas,* 212 U. S. 86;
Miedreich v. *Lauenstein,* 232 U. S. 236;
Willoughby v. *Chicago,* 235 U. S. 45;
Merchants Mutual Auto. Liability Ins. Co. v. *Smart,* 267 U. S. 126;

and this Honorable Court "from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U. S. 117, 125.

Sylvester v. *Washington*, 215 U. S. 80;
Lem Woon v. *Oregon*, 229 U. S. 586;
John v. *Paullin*, 231 U. S. 583;
Erie R. R. v. *Tomkins*, 304 U. S. 64;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202.

From the foregoing, it is to be observed that the statutory provision (28 U. S. C. 1257(2)) relied on by appellant does not sustain the jurisdiction of this Court.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The presence of a substantial Federal question is essential to invoke the jurisdiciton of this Court. If the questions presented are plainly unsubstantial, jurisdiction is not taken.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105.

A claim of unconstitutionality is unsubstantial where (a) it is "obviously without merit," or (b) "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Ex Parte Poresky, 290 U. S. 30, 32;
Levering & Garrigues Co. v. *Morrin, supra.*

The construction of the statute by the Supreme Court of New Jersey was not in conflict with the appellant's contention. The Court held on the facts, that the appellant was not injured or damaged (7 N. J. 541, 549, 551); that any delay in notice merely delayed the time within which the appellant could take an appeal from deputy action (ibid.,

551); that "it was open to plaintiff to challenge in the administrative tribunal the validity of the charges to its account" (ibid., 550) (see subsections 6(c), (d) and (e), Appendix herein, establishing administrative tribunals to hear appeals from deputy action); and that by reason of laches and estoppel the appellant was barred from the relief it sought (*ibid.*, 552).

This Honorable Court accepts the findings of the State Court upon matters of fact as conclusive.

Noble v. *Mitchell, supra;* and cases cited in "Grounds making against Jurisdiction".

And the construction of the statute adopted by the highest appellate court of the State of New Jersey and its interpretation of the scope of the law, must be accepted as conclusive.

Osborne v. *Florida,* 164 U. S. 650, 654;
Missouri ex rel. Hurwitz v. *North,* 271 U. S. 40;
Sioux Remedy Co. v. *Cope,* 235 U. S. 197;
Farncomb v. *Denver,* 252 U. S. 7;
McGregor v. *Hogan,* 263 U. S. 234;
Neblett v. *Carpenter,* 305 U. S. 297;
Alton R. Co. v. *Illinois Commerce Commission,* 305 U. S. 548;
Williams v. *Kaiser,* 323 U. S. 471, 473.

In *Utley* v. *St. Petersburg,* 292 U. S. 106, the Court held that estoppel and laches are non-Federal grounds. The Court said (p. 111):

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they

held aloof without word or act of protest, and then invoked the aid of equity. Following Abell v. Boynton, 95 Fla. 984, 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights. By force of that ruling, the decree of the state court rests upon a non-federal ground broad enough to support it."

To support this appeal, the appellant relies strongly on *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126; *Morgan* v. *U. S.,* 298 U. S. 468, and *Morgan* v. *U. S.,* 304 U. S. 1. As a matter of fact, these cases support the position of the appellee rather than that of the appellant. Administrative remedies were available to appellant under Section 6 of the statute (Appendix herein) but it refrained and refused to avail itself of such remedies. *Lichter* v. *U. S.,* 334 U. S. 742; *Rochester Telephone Corp.* v. *U. S.,* 307 U. S. 125; *Slocum* v. *Delaware L. & W. R. Co.,* 339 U. S. 239.

It is respectfully submitted, therefore, that the Constitutional questions urged by the appellant have been so plainly foreclosed by the decisions referred to, hereinbefore, as to leave no room for real controversy, and the appeal, if the judgment of the court below is not affirmed, should be dismissed for want of a substantial Federal question.

Zucht v. *King,* 260 U. S. 174, 176;
McArthur v. *U. S.,* 315 U. S. 787.

Motion to Affirm Judgment of the Supreme Court of New Jersey

Therefore, comes now the appellee herein, by its attorney, and moves the Court to affirm the judgment from which the appeal in the above entitled cause has been taken, on the ground that it is manifest that every question on which the

decision of the cause depends has been so explicitly foreclosed by the previous decisions of this Court as to render further argument thereof unnecessary.

In the alternative:

Motion to Dismiss the Appeal

Therefore, comes now the appellee herein, by its attorney, and moves the Court to dismiss the appeal for want of a substantial Federal question.

THEODORE D. PARSONS,
Attorney General of New Jersey;
JOSEPH A. MURPHY,
Assistant Deputy Attorney General;
HERMAN D. RINGLE,
Attorney and Counsel for Appellee;
CHARLES A. MALLOY,
Chief Counsel for Appellee.

Dated: October 4, 1951.

APPENDIX

CLAIMS FOR BENEFITS

N. J. Revised Statutes

43:21-6. (a) Filing.—Claims for benefits shall be made in accordance with such regulations as the commission may approve. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service and shall make available to each such individual at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) Initial determination.—A representative designated by the executive director, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final

and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; provided, that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the board of review, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection (e) of this section.

(d) Appeal tribunals.—To hear and decide disputed claims, the executive director with the approval of the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than twenty dollars ($20.00) per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The executive director may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Board of review.—The board of review may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The board of review shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unanimous and by the deputy whose decision has been overruled or modified by an appeal tribunal. The board of review may remove to itself or transfer to another appeal tribunal the proceedings of any claim pending before an appeal tribunal. Any proceeding so removed to the board of review shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The board of review shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness fees.—* * *

(h) Appeal to courts.—* * *

(i) Court review.—Within ten days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review thereof by writ of certiorari directed to the board of review, in which action any other party to the proceeding before the board of review shall be made a defendant.

CONTRIBUTIONS

43:21-7(a) * * *

(b) * * *

(c) Future rates based on benefit experience: (1) A separate account for each employer shall be maintained and this shall be credited with all the contributions which he has paid on his own behalf. But nothing in this chapter shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged against the account of his most recent employers against whose accounts the maximum charges hereunder have not previously been made in the inverse chronological order in which the employment of such individual occurred, but the maximum amount so charged shall not exceed one-sixth of the wages payable to such individual by each such employer for employment on and after the first day of the nine completed calendar quarters immediately preceding such individual's benefit year, or two hundred forty dollars ($240.00), whichever is the lesser, but this provision shall not be construed to limit the duration of benefits payable pursuant to subsection (d) of section 43:21-3 of this title. The commission shall by general rules prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment during the same week.

(2) The commission may prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and shall, in accordance with such regulations and upon application by two or more employers to establish such an account, or to merge their several individual accounts in a joint account, maintain such joint account as if it constituted a single employer's account.

(3) Each employer's rate shall be two and seven-tenths per centum (2 7/10%), except as otherwise provided in the

following provisions. No employer's rate shall be less than two and seven-tenths per centum (2 7/10%) unless and until there shall have been three calendar years throughout which any individual in his employ could have received benefits if eligible.

(4) Each employer's rate for the twelve months commencing January first of any calendar year shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his account for all such years, his contribution rate shall be:

(A) One and eight-tenths per centum (1 8/10%), if such excess equals or exceeds seven and one-half per centum (7½%), but is less than ten per centum (10%) of his average annual payroll (as defined in paragraph (2) subsection (a) of section 43:21-19 of this title);

(B) Nine-tenths of one per centum (9/10 of 1%), if such excess equals or exceeds ten per centum (10%) of his average annual payroll.

If the total of his contributions, paid on his own behalf for all past periods or for the past one hundred and twenty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum (3 6/10%).

(5) No employer's rate for the period of twelve months commencing January first of any calendar year shall be less than two and seven-tenths per centum (2 7/10%), unless the total assets of the fund, excluding contributions not yet paid at the beginning of such calendar year, exceed the total benefits paid from the fund within the last preceding calendar year; and no employer's rate shall be less than one and eight-tenths per centum (1 8/10%) unless such assets at such time were at least twice the total benefits paid from the fund within such last preceding year.

BENEFIT ELIGIBILITY CONDITIONS

43:21-4. An individual, totally or partially unemployed, shall be eligible to receive benefits with respect to any week only if it appears that:

(a) * * *
(b) * * *
(c) * * *
(d) * * *

(e) He has within his base year earned wages of not less than one hundred fifty dollars ($150.00). (As amended by chapter 114, P. L. 1941. Effective May 19, 1941.)

DEFINITIONS

43:21-19. As used in this chapter, unless the context clearly requires otherwise:

(a) * * *
(b) * * *
(c) * * *
(d) * * * Any claim for benefits made in accordance with section six (a) of this act shall be deemed to be a "valid claim" for the purpose of this subsection if the individual has fulfilled the condition imposed by section four (e).

FILED
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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398

HORSMAN DOLLS, INC., a corporation of New Jersey,
Plaintiff-Appellant,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY.
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.
ON MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION.

SAMUEL KAUFMAN,
Attorney for Plaintiff-Appellant,
60 Park Place,
Newark, New Jersey.

NATHAN BILDER,
SANFORD FREEDMAN,
JOHN M. KAUFMAN,
On the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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Supreme Court of the United States

HORSMAN DOLLS, INC., Plaintiff-Appellant, *vs.* UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY, Defendant-Appellee.	On Motion of Appellee to Dismiss Appeal or Affirm.

BRIEF OF APPELLANT.

This brief is filed pursuant to Rule 7, in opposition to a motion to dismiss the appeal from the Supreme Court of New Jersey. The appeal to this court was allowed by Associate Justice Burton by order dated September 19, 1951.

The appellant has also filed a petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered on June 15, 1951. The petition for certiorari presents questions arising under the Constitution of the United States which are in addition to those raised on the appeal.

In its brief in support of the petition for certiorari the appellant has set forth a statement of the case which contains a review of the facts involved. As a convenience to the court, we repeat that statement of facts here.

Statement of Facts.

The appellant is a subject employer under the New Jersey Unemployment Compensation Law which became effective in 1939. The statute established an unemployment compensation fund to which all employers contribute. Until 1942 the rate of contribution was uniform for all; thereafter it was controlled by the cumulative employment experience of each employer. The vital factors in determining the rate were the benefits paid to claimants and the contributions by the employer. For the years prior to 1942, according to the Commission's records, benefits paid to former employees of the appellant substantially exceeded its contributions to the fund. In January 1943, appellant was notified by the Commission that it was assigned the highest rate possible, 3.6% of its annual payroll. The same rates were fixed for the years 1943, 1944 and 1945. By stipulation these rates are also governed by this litigation. The cumulative effect of the charges from 1939 to 1942 is thus of crucial importance.

The statute provides that when a claim for benefits is filed, the deputy shall investigate and on the basis of facts found by him, render a decision upon the validity of the claim. The statute then provides that the deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The Supreme Court of New Jersey has construed the statute so that the appellant is included within the classification of "interested party".

The employer has 7 days after receipt of the notice of the decision to appeal to a tribunal within the agency.

There, for the first time, he receives a hearing at which the claimant must establish his right to benefits. If the appeal is taken payment of the benefits is stayed. If there is no appeal, benefits are to commence after the expiration of the 7 days and the employer is charged for such payments. Usually the entire charge is against the most recent employer of the claimant, but if the duration of his employment with the most recent employer is short, then a portion of the charge is assessed against prior employers. These prior employers are referred to as "base year" employers.

The statute established a series of eligibility and qualification conditions which the claimant was required to meet in order to be entitled to benefits. It was concerning these conditions that the deputy was required to investigate and find the facts. In summary, the eligibility conditions consisted in the requirements that the claimant be able to and be available for work; that he continue to report to an employment office and thus remain in the labor market; that he has been unemployed for two weeks and that he has earned a certain amount of wages during his base year. N. J. R. S. 43:21-4. The causes which will disqualify the claimant from benefits are voluntary cessation from employment without due cause, discharge for misconduct, failure to apply for or accept available or suitable work, work stoppage due to a labor dispute, and the receipt of remuneration either in lieu of notice or as compensation under any workmen's compensation law, or as social security benefits or unemployment compensation benefits from another state or the United States. N. J. R. S. 43:21-5. This was the statutory scheme for the years involved in this litigation.

For the first few months in 1939 the Commission sent to all employers, including appellant, a form B-11 and an accompanying letter advising that a decision had been made (R271a, R277a). In May 1939 the procedure and the form were changed by the Commission so that thereafter it sent the employers only a notice that a claim for benefits was filed. This notice was sent only to the most recent employer even though charges were assessed as well against employers in the base year. The new form asked the employer to submit any information which he had which would disqualify the claimant (R276a). The appellant received these forms when it was the most recent employer. It had no knowledge of disqualifying causes and did not respond to the Commission. After the new form was adopted, the appellant was never notified that a decision had been made upon any benefit claim for which it was charged. This was conceded by the court below.

During the hearings before the referee in 1943 upon the petition to redetermine the contribution rate, the Commission did not produce any form of decision on the benefit claim (R251a). The deputy testified that the decision was the Commission's benefit check which was given to the claimant (R48a). Since the appellant received no notice of a decision, the check was delivered and payments were made to the claimant without affording to the appellant the right to appeal and to receive an opportunity to be heard.

In November 1943, at the last hearing before the referee, the Commission offered into evidence a series of statements containing information with respect to each benefit claim for which the petitioner was charged (R249a). These

statements were compiled by the Commission from various sources of information within the agency for use as an exhibit in the cause (R3a).

It was established at the hearings that the deputy of the Commission never conducted a hearing at which the appellant was afforded an opportunity to be heard, that if there was any examination of the claims, finding of facts or making of decisions, it was done not by the deputy but by subordinates in the department (R42a to R43a; R59a; R263a).

With respect to the facts appearing in the appellee's statement opposing jurisdiction, the Commission continues its concession that it mailed to the appellant a notice of the filing of a claim for benefits only when the appellant was the last employer of the person making the claim. This was also admitted in the New Jersey courts. It thus concedes, as the minority opinion in the Supreme Court of New Jersey pointed out, that each charge made against the appellant when the appellant was not the last employer of the claimant was illegally imposed. The imposition of these charges was clearly a denial of due process under the Fourteenth Amendment to the Constitution of the United States. No contention has ever been made by the Commission and it is not made now, that notice of any kind was sent to the appellant when a claim for benefits was filed in respect of which the appellant was to be charged as an employer in the base year of the claimant.

In its statement opposing jurisdiction (page 4) the Commission quotes at length from portions of the record in which the comptroller of Horsman Dolls, Inc. testified that it did not respond to the notices (Form B-11) which it received from the Commission advising that a claim for bene-

fits had been filed. It appears from this testimony that during 1941 the business of the appellant was seasonal, although during the subsequent years the company "worked right through". The appellant was justified in making no response to the inquiry contained in the form B-11. The procedure of sending a notice of the filing of the claim was one which the statute did not contemplate and one with which the employer was not required to be concerned. The Supreme Court of New Jersey admits in the majority opinion that this procedure was "extra" the statute. 5 N. J. 550. No indication was given to the employer that the form B-11 was a substitute for the notice of decision which the statute provided and from which the employer's appeal could be taken.

In addition, the notice which the Commission sent by its very terms invoked an answer only when the employer was in a position to supply information which might lead to disqualifying the claimant from benefits. Since the appellant's records disclosed no such reason for disqualification there was no duty upon the appellant to respond to the notice. As already noted herein, as well as in the court below, most of the possible disqualifying reasons were those beyond the scope of the employer's knowledge. The contention by the Commission in its review of the facts that the appellant had no objection to the payment of benefits has no support anywhere in the record. As the dissenting opinion points out, the only concession which the appellant made was that its records did not disclose any disqualification. 5 N. J. 554. Indeed, the testimony which the Commission has quoted supports this view because the comptroller testified "there was no objection I could make".

The appellant never received an opportunity to be heard on the validity of the benefit payments before they were made. The record is clear that it did not know of the specific payments until November 1943 when the Commission put into evidence a breakdown of the various charges against appellant's account. The benefit payments upon which these charges were based had been made through the years 1939 to 1942.

POINT I.

Appellant Has a Right to Appeal Under 28 U. S. C., Section 1257(2).

It is argued by the appellee that the appellant is foreclosed from taking this appeal because it failed to challenge the constitutionality of the statute in the state courts.

The attack by the appellant upon the constitutionality of the statute (R. S. 43:21-6(b)) was constantly made from the beginning of the case. One phase of this challenge is stated in the majority opinion of the Supreme Court of New Jersey. It said:

> "It is argued on the brief that the statute requires that the initial determination be followed by weekly determinations during the compensation period of the claimant's right to continued benefits and his eligibility for work; and on the oral argument it was vigorously contended that unless the statute be construed to require weekly decisions and notice thereof to the employer, it would constitute in this regard a denial of due process."

Horsman Dolls, Inc. v. *Unemployment, etc. of N. J.* 7 N. J. 541 at 547 (1951).

Further on in the opinion the court said:

> "And the notice of the initial determination would be of no avail in the discovery of after-occurring disqualifications. Recognition of this led to the contention on the oral argument that unless the statute be construed to require weekly determinations and notice to the employer, it would be violative of due process. The statute makes no such requirement; and its failure so to provide does not constitute a denial of the essence of procedural due process."
>
> 7 N. J. 549.

The appellee points to certain statements in the briefs filed in the Supreme Court of New Jersey and contends that these statements show that the constitutionality of the statue was not questioned by the appellant. In the courts below, as well as before the Commission, Horsman Dolls, Inc. pointed to the fact that the statute did not provide for any hearing to the employer prior to the decision of the deputy of the Commission upon the validity of the claim for benefits. Since it was this decision which initiated the charge against the employer's account, the appellant argued throughout that under ordinary rules of due process it was entitled to notice and hearing before the decision of the deputy was made. *Morgan* v. *U. S.*, 304 U. S. 1 (1938). This was particularly true since the deputy's function was quasi-judicial. The hearing was an essential element of due process. *St. Joseph Stockyards* v. *U. S.*, 298 U. S. 38 (1936).

The appellant pointed out, however, that notwithstanding this otherwise fatal defect, the statute could be sustained if the court would construe it so as to insure to the

appellant an opportunity to be heard at some stage in the proceeding before the benefit payments were made and the charge became effective. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126 (1946). This could be accomplished by construing the statute to require the deputy to send to every employer charged a notice of the decision before the payment of benefits and before the charge against his account.

In order to secure this construction of the statute the appellant had to overcome two obstacles. The first was to establish that it was an "interested party" under the statute and thus entitled to notice of the deputy's decision. The second was to establish the principle that once entitled to the notice of decision, the appellant could not be deprived of it, for if the employer never received the notice it could never know of the decision and it could never take an appeal before the payment of benefits, as provided by statute. It would, therefore, never have the timely opportunity to be heard which due process requires. Under the statute it was the notice of the decision which initiated the right to appeal and it was only upon an appeal that the statute specifically provided such a hearing.

This construction of the statute was urged by the appellant upon the New Jersey courts. The appellant contended that in order to sustain the statute against constitutional objections the court must so construe it as to make it mandatory upon the deputy to give the appellant a notice of decision in every case where the appellant was being charged. Once this condition had been satisfied and the employer had been notified of the decision before the benefits were paid, the employer would then have been afforded an opportunity to be heard and could decide for himself

whether to contest the claim or default. *Mullane* v. *Central Hanover B & T Co.*, 339 U. S. 306 (1950).

With respect to the first point, the entire court held that the appellant was an "interested party" within the statutory language and thus entitled to be notified of the deputy's decision upon the claim for benefits. This is what is meant by the statement in the opinion of the majority that the ambiguity which the court found in the phrase "other interested party" was resolved "in favor of notice". 7 N. J. 547. When the Commission argues to this court in its statement opposing jurisdiction that the Supreme Court of New Jersey did not construe the statute in conflict with the appellant's contention, it is to this point which the argument of the Commission is directed. On this issue the Commission had contended below that the appellant was not an "interested party" because it did not respond to the form B-11 which the Commission sent to the appellant as the last employer when a claim for benefits was filed. This argument of the Commission was rejected by the entire court and the appellant was held to fall within the category of "interested party" notwithstanding its failure to respond to the notice of the filing of the claim for benefits.

With respect to the second point urged by the appellant, however, the justices of the Supreme Court of New Jersey were divided. Three justices held that the statute was to be constructed so as to permit the Commission to substitute for notice "of the decision", a notice merely of the filing of the claim for benefits. The statute was sustained in spite of a construction which permitted the Commission to withhold completely from the appellant any notice that a claim for benefits had been sustained and charged against

the appellant. Under this construction the appellant was deprived of any notice of the decision. This construction permitted the Commission to pay benefits to the claimants and to charge the appellant's account without giving to the appellant an opportunity to be heard either before the decision of the deputy was made, or after. By construing the statute so as to permit the elimination of the notice of the decision the court destroyed the right to appeal, the only statutory procedure which gave to the appellant an opportunity to be heard upon the validity of the claim for benefits.

Examination of the very quotations which the respondent has copied from briefs submitted to the Supreme Court of New Jersey will show that the appellant contended in the courts of New Jersey that the statute was constitutional only if it were so construed as to make it mandatory upon the deputy to notify the appellant of the decision upon the claim for benefits. In the quotation which appears on page 8 of the statement opposing jurisdiction, it was said by Horsman Dolls that the statute was not attacked only if the deputy was required to give the notice of the decision which the statute provided. The majority below did not so construe the statute. On the contrary it was held that under the statute the deputy was not required to notify the appellant of the decision and could instead substitute for the notice of decision a notice which was extra the statute. Such a construction renders the statute unconstitutional and this point was made in the courts below. It was squarely raised and decided.

We have previously quoted the language of the majority below on the due process questions which were raised by

all of the payments had long since been made. Under the statute, the deputy was required to promptly notify the employer of the decision. The statute provided that the employer had a right to appeal with seven days after receiving the notice and before the benefits were paid; the appeal stayed the payment of benefits. This right of appeal after the prompt notice of the decision, was the only appeal which the statute afforded. Under the construction of the statute adopted by the state court the deputy was permitted to destroy this right of appeal by withholding a notice of the decision and substituting instead the notice of the filing of the claim for benefits, from which no right of appeal existed.

It is said by the appellee that there was no denial of due process because the appellant was not injured by the failure to be promptly notified of the decision. It is contended also that the appellant could have taken an appeal after November 19, 1943, when the Commission inserted into the record as an exhibit information relating to the benefits which had been paid years before. The position of the appellee on these points was sustained by the majority. The Court said: "The definitive inquiry is whether plaintiff suffered prejudice by the failure of prompt notice of the allowance of the claims for benefits." 7 N. J. 551.

The appellant consistently argued that its failure to be notified of the decision and the consequent destruction of its opportunity to be heard by taking an appeal from the decision was itself the harm which constituted a deprivation of due process under the Constitution of the United States. In support of this argument the appellant relied upon *Morgan* v. *United States*, 298 U. S. 468 (1936), in which this court rejected an order of the Secretary of Agri-

culture made without compliance with the requirements of due process, notwithstanding the fact that upon examination of a voluminous record it was found that the order was in accordance with the weight of the evidence. *Morgan* v. *United States,* 8 F. Supp. 766, 768, 770 (1934). This court said, however, that when a hearing required by due process was denied, sufficient harm had been shown. "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order." 298 U. S. 181. The same result was obtained in *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1927), where a statute of New Jersey was held to violate due process for want of a provision for notice, notwithstanding the fact that the defendant in the case had actual notice of the pendency of a suit against him, the same notice he would have received had provision therefor been made in the statute. This position of the appellant has been sustained in the courts of other states.

Bell-Brook Dairies, Inc. v. *Bryant,* 35 Cal. (2d) 404, 218 P. (2d) 1 (1950);
Juster Bros. v. *Christgau,* 214 Minn. 108, 7 N. W. (2d) 500 (1943);
Babb et al. v. *Bullet,* 210 Ky. 211, 220 S. W. (2d) 394 (1949).

The loss of the right of appeal was a real injury and a real deprivation of due process for with it went the only opportunity to be heard which the appellant could obtain. Only on an appeal was there an adversary proceeding in which the claimant was required to sustain the burden of establishing the validity of his claim. As the minority opinion below pointed out, the effect of permitting the Commission to eliminate the notice of decision and to make the

validity of the claim for benefits depend upon disqualifying causes supplied by the employer was to shift from the Commission to the employer the burden of determining eligibility. 7 N. J. 555.

The argument by the Commission that an appeal could have been taken by the appellant in 1943 after it was supplied with information concerning the benefit payments overlooks the fact that the statute provides for an appeal within 7 days after notice of the decision and before the benefits are paid. Once the benefits were paid, the availability to the appellant of the administrative tribunal was lost. As the dissenting opinion pointed out, "The Commission was not authorized to pay benefits until such notice had been given and the designated period for appeal had elapsed". 7 N. J. 553. The salutory reason for the statutory requirement that no benefits be paid until the time for appeal had elapsed was to maintain the incentive of the employee to establish his eligibility to benefits. With the payment of the benefits to the claimant, this incentive to establish his right to payments was destroyed.

The majority of the court below said that the several years delay in advising the appellant of the particular benefits paid merely delayed the right of appeal, and that the decision of the deputy was not "final if such notification is not given". 7 N. J. 548.

But if the decision of the deputy was not "final" there was no justification for either the payment of the benefits or the charge to the appellant's account. Yet both were done years before November 1943 when the information on benefit claims was put into the record in the hearings be-

fore the referee. And the Supreme Court of New Jersey passed by the statutory requirement that the notification of the decision was to be "promptly" given. To construe the statute so as to permit data produced as an exhibit in a cause years after the decision to be a prompt notice, when the notice was essential to a timely opportunity to be heard, violated the appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States. The opportunity to be heard must be timely in order to satisfy the elements of due process. *Opp Cotton Mills* v. *Administrator, supra.*

The only administrative remedy which was available to the appellant in 1943 was that remedy which it took and on the basis of which it is now before this court. This very proceeding was initiated upon a form supplied by the Commission itself to the appellant for the purpose of obtaining a review of the charges against its account (R10a). Certainly, no action in any tribunal could have been taken by the appellant when it received the form B-11 (Notice of application for benefits) for this form was extra the statute and there was no method by which an appeal or any other action in respect thereof could be taken.

Finally, the point is made by the appellee that estoppel and *laches,* non-Federal grounds, bar the jurisdiction of this court. These principles appear in the final paragraph of the opinion by the majority after its extended discussion of the due process issues. The court said that the failure of the appellant to make known to the Commission grounds for disqualification led the Commission to make benefit payments, and the appellant could not, therefore, complain. Since the appellant's records never disclosed any

reason to disqualify the claimants, for the appellant to have supplied disqualifying information would have required it to falsify its records. It is nowhere suggested that estoppel and *laches* bar the constitutional issue of weekly determinations or the appellant's right to be heard upon the benefit payments subsequent to the filing of the initial claim for benefits and the mailing of the B-11 to the employer. The record is clear that no B-11 was sent by the Commission after the first weekly benefit payment was made (R67a).

But the absence of disqualifying causes within the knowledge of the employer was not the test of eligibility of the claimant for benefits. If it were, then the statutory provisions which required the deputy to investigate and find the facts and to make a decision thereon contained useless statutory language. As the dissenting opinion notes, there were many reasons under the statute for eligibility and disqualification which the employer could not possibly know without an independent investigation of the facts completely apart from the employment. 7 N. J. 554. But this duty of investigation was specifically imposed upon the deputy by the statute. To suggest that the appellant is barred by *laches* and estoppel predicated upon its failure to supply information which it never possessed is artificial and illusory. The court permitted the Commission to take advantage of its own failure to comply with the statute, even in face of the fact that in the first few months of the statute the commission did notify employers that a determination of eligibility had in fact been made. 7 N. J. 554. This change in procedure by the Commission, without any statutory warrant, is now

used as a basis for estoppel and to support the construction of the statute which the court below has made. This court has rejected similar arguments. *Moser* v. *U. S.*, 341 U. S. 41 (1951).

This court may always examine to see if a non-Federal ground asserted to bar this court's jurisdiction is illusory.

> "It is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support." *Ward* v. *Love County*, 253 U. S. 17, 22 (1920).

Where the non-Federal ground is unsubstantial this court will take jurisdiction. *Williams* v. *Kaiser*, 323 U. S. 471, 478 (1945). *Abie State Bank* v. *Bryan*, 282 U. S. 765 (1931).

The denial to the appellant of a hearing or an opportunity to be heard presents in this case a substantial Federal question over which this court has jurisdiction and which it is bound to consider.

Respectfully submitted,

Samuel Kaufman

SAMUEL KAUFMAN,
Attorney for Plaintiff-Appellant.

NATHAN BILDER,
SANFORD FREEDMAN,
JOHN M. KAUFMAN,
On the Brief.